

IS THIS INSUBORDINATION OR A GOOD FAITH DISAGREEMENT ABOUT HOW TO DO THE WORK?

Incumbent in the notion of insubordination is a refusal to perform the work. It does not always have to be stated in terms of “no I won’t do it,” or similar words, but can also be the refusal to do it a certain way. This too very much depends on the facts. Here too employees have a far better chance of prevailing if they can establish that they were more than willing to perform the job but that they determined that it should be done in a certain way that may be somewhat different from the way the supervisor wanted it or that they made a judgment about a job the supervisor did not like.

In *University of Chicago v Carpenters and Joiners Local 215*, FMCS case # 01-0554 (Jacobs 2002) the grievant was directed to build a crate to ship a large freezer. The employee was a long-time employee who clearly knew how to build crates and had done so many times before. He determined that the crate should be of a certain size and configuration and started to build the crate in that way. The order had been only to “build a crate” for the freezer. When the supervisor saw it, an argument ensued over how to best construct it. The insubordination charge was overturned on those somewhat unique facts.

In another case, the employee was directed to saw off part of a wall on a building under construction. The request was made by phone from a supervisor that was not on the job site and was not aware of the conditions there or the difficulties faced by the work crew. Again, a disagreement ensued over the phone that culminated with the employee hanging up on the supervisor. As will be discussed more below, the insubordination charge for that was sustained and the employee was disciplined for that. The main charge, i.e. that he did not perform the work as directed, was overturned on similar grounds. The employee was a long-time employee with many years of experience doing what he had been directed to do.

There was no refusal to do the work, only a disagreement as to how best to do it. The employee was required to cut off part of a concrete wall with a concrete saw in a bucket loader. He was directed by a supervisor who was 150 miles away and unfamiliar with the situation. The two got into a heated exchange over how best to perform the work safely. As it turned out the supervisor had no idea what was going on and, under those circumstances the grievant was successful in showing that indeed his was the best, and safest, way to do the job. See, *Fabcon and Bricklayers and Allied Craftworkers Local #1*, FMCS case # 05-03238 (Jacobs 2005).

Note that there was an element of the safety exception to this matter that will be discussed below; the issue was how to do the job in the safest way possible.

It should not be assumed that the employee should get to disagree all the time with supervision. Highly relevant in these situations was the fact that the grievants were long time very experience employees who knew exactly what they were doing and that the supervisors, while shown to be competent people, were not there when the actual work was being performed. Also, there was no refusal to do the work and the grievants were shown to be putting forth a good faith effort to do what had been directed either building a crate or sawing off part of a wall.

Employees still take some risk in disagreeing with the supervisor. As noted at the outset, the industrial plant is not a debating society and if the employee’s supervisor is there and is specifically directing the work, the fact that the employee’s ideas are “better” may not fly.

IS THIS INSUBORDINATION OR IS IT AN EMPLOYEE MERELY ASKING QUESTIONS THE EMPLOYER DOESN'T WANT TO ANSWER?

In one case the employee was accused of insubordination and being disruptive at a meeting creating poor morale and disrespectful behavior towards her co-workers and her supervisors for her actions at a meeting called to discuss certain problems and possible policy changes in the department.

The meeting was called for the purpose of providing feedback from the employees to find out why there were errors being made in the billing system and was by all accounts “free flowing” since there was no set agenda. In fact, the supervisor started the meeting by saying that he wanted honest feedback about this problem and solicited suggestions from those present about why the problem existed and how to fix it, which is exactly what he got.

At some point in the meeting the grievant, having been asked for her input by the Company’s representative about errors, did just as she was asked to do: she gave it. She indicated that errors were made because people were logging off the phones and otherwise shirking their responsibilities thereby creating problems in the operation. Her main point though was that the manager was not doing his job and was lousy at it by being lax and letting people get away with rules infractions – thereby causing the problems they all came to discuss. Many of the employees agreed with this but the manager present and some of the employees, presumably those who were culpable of doing this, took umbrage over that since he was the target of her comments.

The grievant, who was from another state, had prior problems in communication but was fired, ostensibly for insubordination, but in reality, for not being “Minnesota nice.”

She was reinstated because not only was there no direct order prohibiting the behavior – the employer actually asked for exactly what they got from the employee, who was apparently the only person in the room with the courage to speak up. See *CWA and Consolidated Telephone Co.* (Jacobs, April 21, 2008), decision on file with Minnesota BMS. As always, be careful what you ask for – you might get it.

ARE THERE ANY MITIGATING FACTORS PRESENT?

1. Did the refusal continue or was there eventual compliance? Arguing about how the order should be complied with is one thing, but simply saying “no” and not doing it is quite another. The former may be seen as an assertion of one’s perceived rights under the contract or a discussion about the best way to perform the job, while the latter is a direct affront to management’s authority and will be harshly dealt with by both employers and arbitrators.

2. Were there any impediments to compliance? Did the employee have difficulty in getting parts or materials? Other logistic problems?

3. How was the order communicated? Was it done respectfully or was it accompanied by ridicule or profanity as was the case in *University of Chicago v Carpenters and Joiners Local 215*, FMCS case # 01-0554 (Jacobs 2002)?

4. When was the order communicated? This may be an issue for overtime work requests. Telling someone that day to work overtime when their schedule may not allow it is perhaps different than telling people a week in advance that they will be required to work overtime.

5. How has this conduct been treated in the past? Is insubordination treated by progressive discipline and if so how? What is the legitimate expectation with regard to this?

EXCEPTIONS - DEFENSES

HEALTH AND SAFETY DEFENSE

Elkouri notes that “an exception to the “obey now grieve later” doctrine exists where obedience would involve an unusual or abnormal safety or health hazard.” See Elkouri and Elkouri, *How Arbitration Works*, 6th Ed. at page 1023. See also, Elkouri and Elkouri at pages 262-67. Professor St. Antoine also notes that “Employees need not immediately comply with an order or rule if they reasonably believe that obedience would place the employee or others in imminent danger of harm: or would suffer an immediate and substantial harm and would lack any satisfactory remedy after the fact.” *The Common Law of the Workplace*, St. Antoine, BNA 2005 at Section 6.8, page 188.

The employee must have a “reasonable” concern for his or her own safety or the safety of others for this exception to apply. This obviously depends in the facts of each case. Elkouri in fact notes that the ‘search for a definitive evaluative standard has proven elusive.” Elkouri 6th Ed @ page 1024-1025. See generally, Elkouri and Elkouri, *How Arbitration Works*, 6th ed. pages 1022–1028. At best a review of the cases shows that the employee’s fears must be reasonable, whatever that means and that there must be a showing of actual potential harm or hazard or some “imminently dangerous situation” justifying the refusal to perform the work. See also, *Laclede Gas Co*, 39 LA 833, 839 (Bothwell 1962).

Elkouri notes that the health and safety exception has been held inapplicable where the hazard is inherent in the employee’s job. See, *How Arbitration Works* 6th Ed. at page 1023. Moreover, the employee must explain the reason for the refusal before announcing they are refusing the work.

Elkouri notes that arbitrators even disagree over who bears the burden of proof of this. Some hold that the employer bears the burden of proof that the employee’s concerns were not reasonable while others hold that the employee bears this burden. It would seem that since this is an affirmative defense the more reasoned view is to require the employee to bear the burden of showing that the refusal was reasonable and based on a rational concern for the safety of the employee or others.

In one case the employees refused to perform certain work claiming that an inmate had MRSA, a disease known to be resistant to many forms of medications. The inmate in question was known to be very combative and disruptive and the employees claimed that to deal with him placed them at risk of contracting the disease. They refused a direct order to work with the inmate claiming that he should be transported to a medical facility better equipped to handle his disease.

The County had provided specific training and equipment necessary to protect the workers and claimed that the refusal was not reasonable under these circumstances. The work was inherently dangerous and it was shown that jailers come into contact with many people who have various diseases some of which are highly contagious and dangerous. They are trained and equipped to deal with this. MRSA was no different. The grievances were denied. See, *Dakota County and IBT 320*, (2000 Jacobs).

CONTRACTUAL VIOLATION

Employees may claim that doing certain work will violate the contract. This is perhaps the classic case of “obey now and grieve later” unless it can be shown that there is some reason that

performing the work or carrying out the order will not be remediable through the grievance process.

Note too that the employee takes some risk here and re-directs the focus of the subsequent arbitration from one of whether there was a contractual violation to whether there was a reasonable refusal to perform the work and whether there is just cause for the discipline that is certain to be meted out. It becomes a question of who is on the hot seat – the supervisor who directed the employee to perform work outside the contract or the employee who has been disciplined for refusing to comply with the directives of a supervisor.

Thus, even if it is later shown that the order did violate some section of the CBA the employee who refused it had better have a good reason for not complying with it initially, especially if there was no harm done and the employee was not in danger by doing it.

For examples of cases involving this issue see *Fairmont General Hospital and Retail Wholesale and Department Store Union, Local 550*, 119 LA 134 (Miller, 2003) and *Fraser Papers, Inc. and PACE Local 7-0445*, 118 LA 1000 (Wyman, 2003).

REFUSAL TO WORK OVERTIME

The employee might legitimately argue that working overtime in violation of the contract cannot be remedied since the time cannot be gotten back – one cannot unring the bell, so to speak.

This will of course depend on the facts and the employee faces a Hobson's choice here. The contractual provision had better be crystal clear. Where there is a difference of opinion the "obey now, grieve later" rule will usually prevail. The union retains the right to bring a grievance for damages and for an award interpreting the contract in the face of the alleged violation. It again changes the focus from one of whether there is a contract violation to whether there was just cause for discipline.

EMPLOYEE'S REQUEST FOR TIME OFF

Related to the issue above is a request for time off that is refused and the employee goes anyway, claiming some need or contractual right to it. This is generally subject to the "obey now grieve later" rule but arbitrators may be lenient when the facts show that compliance with an order that is in violation of contractual rights may not be remediable after the fact. One example of this is the request for vacation time that was refused allegedly in violation of contractual seniority rights where the employee had made good faith plans to go and working would have caused economic loss.

There is of course a considerable risk to the employee for doing this – they could even be considered AWOL and face the allegation that they forfeited their job along with the charge of insubordination. Again, these cases will depend greatly on the facts. Employers will of course need to establish that the request was reasonable. Unions will want to show that the loss to the employee was considerable or that there were very legitimate reasons for not complying, i.e. missing a wedding or other important event.

EMPLOYEE ACTING IN THE CAPACITY OF UNION STEWARD

An employee acting in their capacity as a union steward or representative may well have more latitude in saying and asserting things to management than line employees. Acting as the union steward is thus different in terms of the relationship between employer and employee than where that employee is not acting as the union steward.

Where the employee is a union official exercising rights on behalf of the bargaining unit and in pursuit of collective bargaining, conduct that otherwise may be the subject of discipline, remains protected activity, and can only be removed from that protection, by "egregious" misconduct. Thus, in *Labor-Management Contracts at Work* (Harper 7 Bros., 1961) Morris Stone, editorial director of the American Arbitration Association stated: "When a steward or union officer is disciplined for violating some rule of conduct, there may be a dispute as to whether there was just cause for the penalty. To that extent a steward's case may be no different from that of any other employee. However, when the union asserts that the disciplinary action was motivated by an attempt to frustrate collective bargaining, or that the steward's violation occurred during the course of negotiations and was, therefore, beyond the reach of the employer's power to discipline, a different sort of problem is presented."

A more current textbook on labor-management relations, *Discipline and Discharge in Arbitration*, (Brand, Norman, ABA, BNA, 1998), makes the same point:

A union steward or official serves in two capacities: first, as a bargaining-unit employee receiving pay or wages: and second, as a designated representative for the union in what are commonly referred to as union activities. When the union representative is acting in an official capacity, negotiating grievances or engaging in collective negotiations, the union representative and the company have been described as "equals." Thus, arbitrators have recognized, that while acting on behalf of the union, "[a] union representative must be able to do his job properly, without fear of retaliation of any kind for the performance of his proper role" and that "[m]ere zealotry can never justify punishment and a steward is certainly entitled to be wrong in issues that he presses on behalf of his constituents." *Id* at 326.

See also Elkouri, 8th Ed. at Section 5.11.CV. Elkouri provides an excellent discussion of the general rule and of cases where the steward's activity "crossed the line" and provided a basis for discipline up to termination, where the actions were so outrageous or disruptive as to lose protection.

This does not give carte blanche to union stewards to act as they please however. Arbitrators and the Board have long held that there is a line over which even a union steward acting in that capacity dare not go.

Obviously, there is a vast difference between getting into a heated discussion even to the point of screaming in a closed negotiation session versus doing that same thing out on the floor in earshot and within the sight of other employees or clients/customers even if the steward is acting to enforce what they believe to be the proper interpretation of the labor agreement. See, *Union Fork & Hoe*, 101 LRRM 1015, (1980) where the Board, citing to its earlier decisions in *Clara Barton Terrace Convalescent Center*, 92 LRRM 1621 (1976) and *Hawaiian Hauling Service, Ltd.*, 90 LRRM 1011 (1975), reiterated that the NLRA protects a union steward even if he exceeds the bounds of contract language, unless the excess is extraordinary, obnoxious, wholly unjustified, and departs from the *res gestae* of the grievance procedure.

Stewards should be careful to make sure they do not get out of control in a way that might demonstrate to outsiders who may not be aware of what is going on. Examples of this might include yelling at a supervisor on the sales floor or engaging in profanity that offends the office staff or customer who may overhear the conversation.

Obviously too, the person seeking this protection must make it clear that they are now stepping out of their role as employee and into the role of steward. How this is done will depend, but a statement to the effect that “I, as union steward, believe you are violating the contract and so we are not going to perform this work,” or something to that effect, may make it crystal clear that the employee is acting as the steward at that point. There may be other circumstances, such as appearing on behalf during a grievance meeting where no “magic words” are not necessary since it is apparent that the employee is appearing as a steward in that setting.

This of course will depend on the facts of each case, but the rule is clear that when acting in the capacity of a union official, employees are regarded as equals to their supervisor and may make statements which would be disallowed and subject to discipline if they were not.

POTENTIAL WEINGARTEN VIOLATIONS

This arises in the situation where the employer wants to meet with the employee to discuss possible discipline. The employee expresses a desire for a union steward which the employee has a right to under *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251 (1975), but the employer refuses. Generally, the employer should stop the meeting until the steward is there but what if they refuse and order the employee to meet with them? Can the employee refuse?

Maybe not. The answer is not entirely clear but even many unions tell their members not to leave the meeting or refuse to meet in the face of what is frankly an unfair labor practice.

It is part of the “obey now grieve later” scenario. The Employer though runs a grave risk that any statements made in that meeting cannot be used to support the case for discipline.

DISRESPECTFUL BEHAVIOR BY THE EMPLOYEE.

Does calling your supervisor an idiot constitute insubordination? In many cases yes. There are instances where simple disrespectful behavior, profane language and even gestures can be interpreted as insubordination. There is a legitimate expectation of respect by employees toward their supervisors and using profane language, questioning their competence especially in front of other employees or customers of the business, and certain other actions can be found insubordinate behavior by employers and ultimately arbitrators.

Here again, this will depend on the circumstances. Saying something on the floor of a retail store is very different from what goes on in a steel mill or other heavy industrial shop for example. The case will get worse for the employee if the profane language etc. is used in the context of refusing work.

On the other hand, a supervisor who starts the conversation with obscenities and disrespectful behavior may not come to expect anything different from the employee. See *University of Chicago v Carpenters and Joiners Local 215*, FMCS case # 01-0554 (Jacobs 2002) (the supervisor confronted the grievant with very disrespectful words and actions before learning why the grievant did not immediately respond to his pages).

See also *Fabcon and Bricklayers and Allied Craftworkers Local #1*, FMCS case # 05-03238 (Jacobs 2005). The supervisor raised his voice and screamed obscenities into a cell phone quite loudly and the grievant hung up on him. The discipline for insubordination in that case was overturned on several grounds but there was a clear factor that the supervisor lost his temper well before the grievant did and was acting inappropriately.

The circumstances will vary with what is accepted in the shop and how events unfolded. In a case where the employee had been told repeatedly not to yell at his supervisor and not to impugn his ability to supervise, an employee was fired for telling the supervisor that he was a “liar and would burn in Hell” in a closed meeting to review the grievant’s work performance. See, *IBT #120 and University of St. Thomas*, FMCS case # 060504-55873-7 (Jacobs 2007). That case turned not only on the behavior, but also on the repeated admonishments not to do it again and the repeated violations.

PERSONAL RIGHTS

Some of the most significant exceptions to the “obey now, grieve later” rule involve basic personal rights. These vary with the nature of the claims of personal rights and whether they involve some religious or other type of statutorily protected activity that provides a basis for a refusal. These cases frankly are never easy and many times involve a discussion of issues outside of the bargaining relationship.

Here are a few fact patterns and their outcome. These are illustrative examples only but provide some basis for the discussion about what happens and what the analysis is when there is a clash between the legitimate rights of an employer to direct the work of employees as opposed to certain individual rights that are likely not specifically referenced in a labor agreement:

1. Refusal to allow access to computer files where 5th Amendment rights were impacted - no insubordination since there was no obligation to answer the questions. This case is very fact specific. *Washoe County and Washoe County Employees’ Assn.*, 97 LA 393 (Concepcion, 1991). The arbitrator noted “Put simply, where an employee cannot be compelled to answer a question, he or she cannot be considered insubordinate when he or she refuses to do so.”

2. Refusal to work on Good Friday because of religious preference versus religious obligation – insubordination was found largely on the basis that there was lack of proof of the true need to attend services. *Bronx-Lebanon Hospital Center and Retail, Wholesale and Department Store Employees*, 90 LA 1216 (Babiskin, 1988).

3. Refusal to sign broad request for medical information based on right to privacy - no insubordination. *Dakota Gasification Company and International Brotherhood of Electrical Workers, Local 1593*, 120 LA 762 (Kenis, 2004). See also, *Roth Pump Mfg. Co. and National Industrial Workers Union, Local 607*, 82 LA 1199 (O'Reilly, 1984). HIPAA, the Health Information Privacy and Portability Act, may now cover a lot of this. Employers sending people for a drug test, for example, should be careful to make sure the health care facility knows who is requesting the test so they can be assured access to the records. If you don't pay for it, you may not be able to get the records without an authorization from the employee and if the employee does not wish to sign it, there may be a valid reason for that refusal.

4. Refusal to submit to drug test as a matter of contract right where there was no reasonable suspicion for test - no violation found. *Pioneer Flour Mills and Teamsters, Local 1110*, 101 LA 816 (Bankston, 1993). This too is a fact specific case but provides a good discussion of the analysis used to determine whether insubordination occurred or not.

5. Refusal to submit to drug test due to absenteeism - no violation of “obey now, grieve later” and no insubordination found. The arbitrator noted that under these facts there was a legitimate expectation of privacy and that this controlled. *Utah Power and Light Co. and IBEW, Local 57*, 94 LA 233 (Winograd, 1990).

6. Repeated refusal to submit to psychiatric fitness for duty examination - discharge upheld. *LaGloria Oil and Gas Co. and PACE*, 119 LA 1675 (Allen, 2004). This case is somewhat fact-specific, but provides some discussion on the rules that may apply here.

“GROSS” INSUBORDINATION

Insubordination covers a wide range of behavior. Some agreements recognize this and refer to discharge for “gross” insubordination, or in some similar fashion acknowledge that some insubordinate behavior is less serious than others. Generally, the distinction between insubordination and “gross” insubordination, if such a distinction can be drawn, rests on how blatant or public the employee’s insubordinate behavior. For example, assume a supervisor approaches an employee who is working alone and gives the employee an order. The employee expresses disdain either by taking too long to comply or by word or deed. While the facts establish insubordination, the employee’s behavior took place in isolation from the workforce and did not cause any serious disruption of the workplace. Discharge might not be sustained on these facts because the nature of the insubordinate conduct is neither inherently disruptive nor beyond the ability to correct through discipline.

Conversely, if the order is given to an employee in the presence of others, and the employee challenges the order by an outright refusal, or by abusive language or other behavior that denigrates the authority of the supervisor, a far more serious case exists. On these facts a discharge is far more likely to be upheld given that the conduct was not only inherently wrong, but also was a public challenge to the authority of the supervisor. In this case the harm caused by the insubordinate behavior extends to the workplace as a whole and discharge becomes a reasonable disciplinary response.

In one case the employer brought in outside trainers to develop a new production system and told the employees this would be happening. The arbitrator found that the Company had adequately notified the employees that these individuals had authority to direct the workforce and that the grievant was repeatedly told by his direct supervisor to follow the direction of the trainers.

The operative CBA language read as follows:

“No warning notice need be given to an employee before being discharged if the cause for such discharge is one of the following: ...

D. Refusal to follow an order of supervision in the presence of a steward or Union representative.”

The grievant was told to follow the directives of the trainers and he refused. The supervisor then brought over a steward to hear the order. The order was again given whereupon the grievant’s answer this time was, “F**k you, no.” His subsequent discharge was sustained. See, *Red Wing Shoe Co. and UFCW #527*, FMCS CASE # 05-51578 (Jacobs 2005).

This was about as clear cut a case of “gross insubordination” as one could imagine. What was significant though was the language of the CBA that virtually required termination if the proper facts were found.

There may be simply a good faith difference of opinion over how to do the work rather than refusal to do the work or follow the order. In *University of Chicago v Carpenters and Joiners Local 215*, FMCS case # 01-0554 (Jacobs 2002) the grievant was directed to build a crate to ship a large freezer. The employee was a long-time employee who clearly knew how to build crates

and had done so many times before. He determined that the crate should be a certain size and configuration and started to build the crate. The order had been only to “build a crate.” When the supervisor saw it, a heated argument ensued over how to best construct it. There the charge was overturned.

In another case, the employee was directed to saw off part of a wall on a building under construction. The request was made by phone from a supervisor that was not on the job site and was not aware of the conditions or the difficulties faced by the work crew. The employee was a long-time employee with many years of experience. A disagreement ensued over the phone that culminated with the employee hanging up on the supervisor. The insubordination charge was sustained for the hang up but the main charge, i.e. gross insubordination for failure to perform the work as directed, was overturned and the employee reinstated.

There was no “refusal” to do the work, only a disagreement as to how best to do it. Under those circumstances the grievant was successful in showing that indeed this was the best, and safest, way to do the job.